

STATE OF SOUTH CAROLINA

(Caption of Case)

State Universal Service Support of Basic Local
Service Included in a Bundled Service Offering
or Contract Offering

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

COVER SHEET

DOCKET

NUMBER: 2009 - 326 - C

(Please type or print)

Submitted by: Margaret M. Fox, Esquire

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DOCKETING INFORMATION (Check all that apply)

☐ Emergency Relief demanded in petition☐ Request for item to be placed on Commission's Agenda expeditiously☐ Other:

| INDUSTRY (Check one) | NATURE OF ACTION (Check all that apply) | | |
|--|--|--|--|
| <input type="checkbox"/> Electric | <input type="checkbox"/> Affidavit | <input checked="" type="checkbox"/> Letter | <input type="checkbox"/> Request |
| <input type="checkbox"/> Electric/Gas | <input type="checkbox"/> Agreement | <input type="checkbox"/> Memorandum | <input type="checkbox"/> Request for Certification |
| <input type="checkbox"/> Electric/Telecommunications | <input type="checkbox"/> Answer | <input type="checkbox"/> Motion | <input type="checkbox"/> Request for Investigation |
| <input type="checkbox"/> Electric/Water | <input type="checkbox"/> Appellate Review | <input type="checkbox"/> Objection | <input type="checkbox"/> Resale Agreement |
| <input type="checkbox"/> Electric/Water/Telecom. | <input type="checkbox"/> Application | <input type="checkbox"/> Petition | <input type="checkbox"/> Resale Amendment |
| <input type="checkbox"/> Electric/Water/Sewer | <input type="checkbox"/> Brief | <input type="checkbox"/> Petition for Reconsideration | <input type="checkbox"/> Reservation Letter |
| <input type="checkbox"/> Gas | <input type="checkbox"/> Certificate | <input type="checkbox"/> Petition for Rulemaking | <input type="checkbox"/> Response |
| <input type="checkbox"/> Railroad | <input type="checkbox"/> Comments | <input type="checkbox"/> Petition for Rule to Show Cause | <input type="checkbox"/> Response to Discovery |
| <input type="checkbox"/> Sewer | <input type="checkbox"/> Complaint | <input type="checkbox"/> Petition to Intervene | <input type="checkbox"/> Return to Petition |
| <input checked="" type="checkbox"/> Telecommunications | <input type="checkbox"/> Consent Order | <input type="checkbox"/> Petition to Intervene Out of Time | <input type="checkbox"/> Stipulation |
| <input type="checkbox"/> Transportation | <input type="checkbox"/> Discovery | <input type="checkbox"/> Prefiled Testimony | <input type="checkbox"/> Subpoena |
| <input type="checkbox"/> Water | <input type="checkbox"/> Exhibit | <input type="checkbox"/> Promotion | <input type="checkbox"/> Tariff |
| <input type="checkbox"/> Water/Sewer | <input type="checkbox"/> Expedited Consideration | <input type="checkbox"/> Proposed Order | <input type="checkbox"/> Other: _____ |
| <input type="checkbox"/> Administrative Matter | <input type="checkbox"/> Interconnection Agreement | <input type="checkbox"/> Protest | |
| <input type="checkbox"/> Other: _____ | <input type="checkbox"/> Interconnection Amendment | <input type="checkbox"/> Publisher's Affidavit | |
| | <input type="checkbox"/> Late-Filed Exhibit | <input type="checkbox"/> Report | |

Print Form

Reset Form

October 14, 2009

M. John Bowen, Jr.

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Charles L. A. Terreni
Chief Clerk and Administrator
South Carolina Public Service Commission
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: State Universal Service Support of Basic Local
Service Included in a Bundled Service Offering
Or Contract Offering
Docket No. 2009-326-C

Dear Mr. Terreni

I am writing in response to Mr. Ellerbe's letter dated today regarding a discovery dispute that has arisen in the above-captioned proceeding.

The dispute centers around proprietary business information of the incumbent local exchange carriers ("ILECs") that happens to be in the possession of ORS due to its role as administrator of the State USF. A discovery request was made by the South Carolina Cable Television Association, CompSouth, tw telecom of south carolina llc, and Nuvox Communications Incorporated (collectively "CLECs") to ORS, in which the CLECs asked ORS to turn over annual information filed by the ILECs, including members of the South Carolina Telephone Coalition ("SCTC"), whom we represent in this matter.

The information in question is already protected from disclosure by Commission Order Nos. 2005-139 and 2005-185 in Docket No. 1997-239-C. Nonetheless, David Butler, as the Hearing Officer, has directed ORS to provide the information to the CLECs.

The SCTC and ORS believe that the Hearing Officer's directive is inconsistent with prior Commission Orders protecting this information from public disclosure. The primary reason for protecting this information is so that competitors like the CLECs will not have access to the ILECs' proprietary business information. See Order No. 2005-139 at pp. 2-3 ("In light of the current telecommunications environment, it is not appropriate to make detailed information regarding a party's operations publicly available. Access to this information could give actual and potential competitors an unfair competitive

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advantage.”) (Emphasis added.) Neither the SCTC nor ORS has an objection to releasing appropriate information in aggregate form, as long as detailed company-specific information is not released, consistent with prior Commission orders. Aggregate information is more than sufficient for Mr. Ellerbe’s stated purposes with respect to the data and with respect to this proceeding, which is a generic proceeding.

In his letter, Mr. Ellerbe argues that it is incumbent upon parties seeking to prevent discovery to do so by filing a motion for a protective order. Mr. Ellerbe completely ignores the fact that this information is already subject to a protective order issued by the Commission. The Hearing Officer’s directive is not a final agency action and is, by statute, specifically “subject to being overruled by the Commission.” S.C. Code Ann. § 58-3-40(C)(2). This is particularly true when the Hearing Officer’s directive is inconsistent with prior Commission orders regarding the same information.

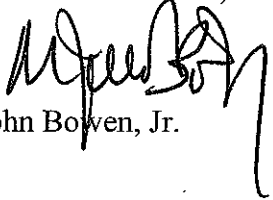
Mr. Ellerbe also states that ORS should have asked for a stay of the Hearing Officer’s order, and that the information should be turned over pending review of the Hearing Officer’s order by the full Commission. He states that this can be done “without prejudice to [ORS’] ability to contest the basis of the Hearing Officer’s decision.” At the same time, Mr. Ellerbe states that he has an immediate need for the information so that he can review it before preparing rebuttal testimony. Mr. Ellerbe is, in effect, asking ORS to turn over ILEC information for his use, “without prejudice” to the SCTC’s and ORS’ position that the information is protected from disclosure. Not only would this be prejudicial to the SCTC’s and ORS’ position, but it would completely moot the question of whether or not the information should be turned over, which is exactly what we are disputing. The SCTC and ORS were not required to request a stay because the Hearing Officer’s directive is not a final agency action and, in fact, is inconsistent with prior Commission Orders. In fact, Commission Order No. 2005-139 expressly provides that, if any person applies to the Commission for a ruling that protected materials are not entitled to such status, “[t]he materials that are subject to such an application should continue to be protected from public disclosure unless the Commission enters an order to the contrary.” Commission Order No. 2005-139 at p. 3 (emphasis added). While CLECs are not seeking “public” disclosure, they are seeking disclosure to that portion of the public (i.e., actual and potential competitors) that was of most concern to the Commission and was the basis for issuing the protective orders.

For the reasons stated above and in the Joint Motion filed by the SCTC and ORS on October 12, 2009 (a copy of which is attached hereto), we respectfully request and strongly urge the Commission to review and overrule the Hearing Officer’s directive in this matter, as specifically permitted by S.C. Code Ann. § 58-3-40(C)(2) and Commission Regulation 103-804(G). We also respectfully request that the Commission hear oral arguments on this dispute at its earliest convenience and that, in the meantime, the Commission clarify that ORS should not turn over the ILECs’ proprietary business information until the Commission has made its determination on this matter. Any other decision would make Commission review of the Hearing Officer’s directive moot and would deprive the SCTC and ORS of a meaningful opportunity to have the

Hearing Officer's directive overruled by the Commission, as provided by law. Furthermore, it would set a bad precedent for future litigants that there is no meaningful opportunity for review of Hearing Officer's directives at the Commission, even when the directive directly conflicts with a prior Commission order on the same subject matter, negating the clear language of S.C. Code Ann. § 58-3-40(C)(2).

Sincerely,

McNAIR LAW FIRM, P.A.


M. John Bowen, Jr.

MJB,Jr./rwm
Attachment

cc: Parties of Record

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO. 2009--326-C

| | | |
|--|---|--------------------------------|
| In Re: |) | |
| State Universal Service Support of Basic Local |) | JOINT MOTION REQUESTING |
| Service Included in a Bundled Service Offering |) | COMMISSIONER REVIEW OF |
| or Contract Offering |) | HEARING OFFICER'S |
| |) | ORDER |

Pursuant to 26 S.C. Code Ann. Regs. 103-804(G) and 103-829 (Supp. 2008), the South Carolina Telephone Coalition ("SCTC") and the South Carolina Office of Regulatory Staff ("ORS") hereby submit this Joint Motion Requesting Commissioner Review of the Hearing Officer's Order. ORS received via email on Wednesday, October 7, 2009 the Hearing Officer's Order. The Order requires ORS to produce the documents filed by the Carriers of Last Resort ("COLRs") that are responsive to Request 1-1 within five (5) days of receipt of the Order. Given the short period of time allotted, SCTC and ORS were not able to file this Joint Motion any earlier than Monday, October 12, 2009.

The grounds for requesting Commissioner review of the Hearing Officer's Order are as follows:

1) The Hearing Officer reached his decision at least in part based upon the belief that ORS alone was objecting to the production of the information sought. (See Page 5). However, ORS contacted each COLR or counsel for each COLR to determine whether (1) the COLRs considered the information sought confidential and proprietary and (2) irrelevant to the pending issue in this docket. Based upon those conversations, ORS objected to the production of the

information sought. Further, because the discovery was directed at ORS and not to each individual COLR, ORS responded. Arguably, the information requested could have been sought from each COLR rather than ORS and each COLR would have had an opportunity to state their position relative to the request.

2) ORS respectfully submits that the Hearing Officer is mistaken regarding the calculation and distribution of the High Cost Support.

According to S.C. Code Law § 58-280(E)(5) and the PSC Guidelines and Administrative Procedures, the COLRs are required to file reports with the ORS demonstrating the difference between the cost to provide service and the maximum rate the COLR may charge the customer for its service. However, this Commission in Order No. 2001-996 implemented a phased-in approach to calculating the high cost support component of the state USF. The Supreme Court of South Carolina reviewed and affirmed the Commission's phased-in approach. According to the PSC Guidelines and Administrative Procedures, the high cost support component was to be implemented in three phases:

(1) Initial Phase

The high cost support component is equal to the revenue reductions made by the COLRs as a result of reduced tariffed rates approved by the PSC. The Initial Phase is limited to no more than one-third of the total fund approved by the Commission. The COLRs file cost study data to demonstrate that implicit support exists in the tariff rates proposed to be reduced. According to Footnote #2, p.5 of the PSC Guidelines and Administrative Procedures, "the High Cost Support shall be equal to the

revenue reductions as the result of reduced tariffed rates approved by the Commission.”

(2) Second Phase

The Second Phase is limited to no more than two thirds of the total state USF. The high cost support component for the COLR is based on reduced tariffed rates which demonstrate implicit support exists in the tariffed rates proposed to be reduced and updated cost of service data.

(2) Subsequent Phases

Any Subsequent Phase allows the COLR to transition to full high cost support funding. The high cost support component for the COLR is based on reduced tariffed rates which demonstrate implicit support exists in the tariffed rates proposed to be reduced and updated cost of service data.

3) COLR high-cost disbursements have been calculated and distributed in this manner since the State USF was implemented in 2001. Currently, the total amount of State USF high cost disbursement per COLR remains essentially static due to the fact that most COLRs have not withdrawn State USF beyond the Initial Phase, and no requests for additional State USF have been made or approved since 2004. According to Commission Order No. 2004-452, the per-line support calculation is performed for “portability purposes.” If this Commission had authorized two COLRs to provide service in the same service area, the State USF would be portable from one COLR to another in the event a customer changed service providers. Because there is no instance where two COLRs provide service in one service area, there has been no “porting” of State USF support. The amounts authorized by this Commission in prior Commission orders under Docket No. 1997-239-C to be distributed to each COLR are the

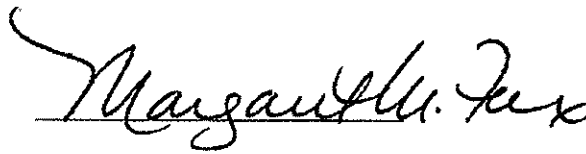
amounts distributed by ORS. In addition, the Commission determined that to try and fully fund the State USF would not be in the public interest and instead opted for a phased in approach. The Commission further found that the State USF should remain "static" so that the support that keeps basic local exchange service affordable does not disappear. (See Order No. 2004-452).

4) The CLECs assert that the forms submitted by the COLRs annually to ORS is the sole determining factor of how the COLRs disbursement of State USF support is calculated. ORS does not agree. While it is a requirement that the COLRs complete the forms, it is not determinative of the amount disbursed which is clearly identified in the PSC Administrative Guidelines and Procedures. (See attached affidavit of Mr. James M. McDaniel). Whether the COLR has one eligible line or one thousand eligible lines, that COLR is receiving the same amount of disbursement authorized by this Commission.

5) Furthermore, the Hearing Officer's Order ties the relevance of the requested information to the CLECs' desire to learn more about "eligible lines" and "maximum amount that they can charge for their eligible lines." It has been conceded that the COLRs do not break down bundled lines and stand-alone lines on the *South Carolina Annual Universal Service Fund ILEC Data Report* and the *South Carolina State USF Per Line Support Calculation forms*. The number of "eligible" lines includes bundled lines, and the "maximum amount they can charge for eligible lines" are the companies' respective tariffed rates for residential and single-line business service. Thus, as we have stated, there is no relevant information that can be gleaned from the requested data that is not already known.

WHEREFORE, for the reasons set forth above, SCTC and ORS request that the Commission grant an opportunity to review the Hearing Officer's Order.

Respectfully submitted,



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October 12, 2009
Columbia, SC

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2009-326-C

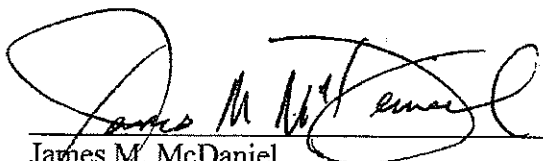
In Re: State Universal Service Support)
Of Basic Local Service Included in a)
Bundled Service Offering or Contract)
Offering)

AFFIDAVIT
OF
JAMES M. MCDANIEL


PERSONALLY appeared before me, James M. McDaniel, who first being duly sworn, states the following:

1. I worked for the Public Service of Commission of South Carolina ("Commission" or "PSC") as an associate engineer and chief of the telecommunications area in the Utilities Department for approximately 28 years. In September 2004, I joined the South Carolina Office of Regulatory Staff ("ORS") as a Program Manager in the Telecommunications Department.
2. During my employment with the Commission, the State Universal Service Fund ("State USF") was created and administered by the Commission.
3. As the Program Manager for ORS, I assist with the administration and annual re-sizing of the State USF. The method of disbursement used by ORS is the same as that used by the Commission.

Dated: October 12, 2009.


James M. McDaniel
Program Manager, Telecommunications

SWORN to before me this 12 day of October, 2009


Notary Public for South Carolina Pamela J. McMillan
My Commission Expires: May 3, 2017

BEFORE
THE PUBLIC SERVICE COMMISSION
OF
SOUTH CAROLINA

DOCKET NO. 2009-326-C

IN RE: State Universal Service Support of Basic Local)
 Service Included in a Bundled Service Offering)
 or Contract Offering)
 _____)

**CERTIFICATE
OF SERVICE**

This is to certify that I, Rebecca W. Martin, an employee with the McNair Law Firm, P. A., have this date served one (1) copy of the attached letter in the above-referenced matter to the persons named below by causing said copy to be deposited with the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as shown below.

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A handwritten signature in cursive script, reading "Rebecca W. Martin", written over a horizontal line.

Rebecca W. Martin
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October 14, 2009

Columbia, South Carolina